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No. 86-1150

In the Supreme Court
OF THE
United States

OCTOBER TERM 1986

A. FRANK MCMILLAN and
GLADYS BOTTROFF MCMILLAN,

Petitioners,

VS.

GOLETA WATER DISTRICT; EDWARD G. MASCHKE;
PATRICIA SHEWCZYK;
DONNA O. HONE; DONALD W. WEAVER; JACK D.
WALKER; and LLOYD C. FOWLER,

Respondents.

On Cross-Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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This Brief for Respondents in Opposition to Petitioners' Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is based chiefly upon the Petition for Writ of Certiorari filed on December 9, 1986, by the Goleta Water District, *et al.* (Respondents herein) as Petitioners, No. 86-985.

STATEMENT OF THE CASE

The "statement" of this case and the "facts" have been set forth three times before this Court, once in the Goleta Water District's Petition for Writ of Certiorari, and twice more by the Respondents thereto in their Opposition Brief and by them as Petitioners in their Cross-Petition for Writ of Certiorari, to which this Brief is addressed. We respectfully request the Court to consider the two proceedings as consolidated so that we may adopt the "Statement of the Case" and "The Facts" as set out previously in the Goleta Water District's Petition as though fully set forth at length herein.

ARGUMENT

Point I

The McMillans State No "Taking" Claim

The gist of the argument made by the Cross-Petition is a simple disagreement with the application of the precedent-setting case of *Hollister Park Investment Co. v. Goleta County Water District [1978]*, 82 Cal.App.3d 290. The McMillans' argument is based upon the assertion that they "are not asserting a compensable property interest in water," but are seeking to protect their property right to "make reasonable economic use of their property." (Cross-Petition, pages 7-8) This argument is pure sophistry; it is a distinction without a difference. The McMillans' litigation is based upon the fact that the water moratorium passed by the voters of the Water District in 1973 prevents them from getting water to their property. They seek damages in inverse condemnation. *Hollister Park* bars the action if they are "potential water users."

POINT II

The McMillans State No Substantive Due Process Claim

The McMillans are attempting to change horses in midstream. The action they brought is for inverse condemnation and it is controlled by *Hollister Park.* The McMillans make the same argument here in the federal jurisdiction that was made in the state courts in *Hollister Park,* to wit: that the ordinance/initiative represents a no-growth policy. That argument misconstrues the ordinance and the initiative. They do not prohibit the acquisition of new water sources; to the contrary, they mandate that the District seek new sources of water. If the McMillans believe that the District has not sought new sources of water or that the continuation of the moratorium is a sham, then their remedy is in a petition for mandate. *Hollister Park, supra,* page 294.

The McMillans have turned an obvious and simple remedy into a constitutional challenge; they claim a denial of due process. That theory is not useful on these facts. There is no constitutional irregularity here — only an attempt by the District to meet the mandate of the voters as decided in 1973. If the District Board has not met the requirements, the McMillans can make the election of remedies provided in *Hollister Park.*

POINT III

Summary Judgment on the Equal Protection Clause Was Entirely Proper

The McMillans urge that there were insufficient facts to support the Court's conclusion that there was no violation of their equal protection rights.

Unaccountably, the McMillans raise objections to the District's moving papers for the first time, on this, their Cross-Petition. They claim that the District's moving papers were "conclusionary," that it refers only to "Mr. McMillan" and that the District's evidence only refers to those who are "similarly situated." The McMillans now claim that the declaration should have also referred to "Mrs. McMillan" and that a reference to those "similarly situated" should have said they were treated in the same fashion as other persons who own residential property. Thus, the McMillans conclude that the District's evidence does not conform to Federal Rules of Civil Procedure, Rule 56(e).

The fact of the matter is that the District's moving papers were never challenged by the McMillans or their counsel heretofore. Neither the District Court nor the Ninth Circuit had any reason to review the sufficiency of the documentation. The issue, if there is one, is too late to raise at this juncture.

More important is the fact that the Cross-Petition did not carry the burden imposed by the same rule, 56(e), upon which they have relied. That authority requires that the McMillans, in their response, "must set forth specific facts showing that there is a genuine issue for trial." They simply didn't do that. Moreover, they made absolutely no effort in their Cross-Petition to present any facts that would demonstrate that there was any genuine issue to try except to point to:

1. Campaign literature apparently circulated by various candidates for office to the water District Board of Directors, and

2. A ballot argument that was written by counsel for the District that indicated that the 1973 morato-

rium was designed to balance water demand with water supplies.

Surely campaign literature published by enterprising candidates for public office can hardly be interpreted as proof of anything. Indeed, to point to such "evidence" is patently absurd.

The comment by the Water District counsel is equally unpersuasive. Indeed, the statement is a reflection of the conclusion stated by the *Hollister Park* court when it said that the "initiative represents a moratorium upon new service connections during drought conditions while a feasible and financially acceptable plan for expansion is developed." (*Hollister Park, supra,* page 294) Such "evidence" is hardly proof that the moratorium was enacted and continued in furtherance of an illegitimate "no-growth" policy.

In summary, the "proof" offered by the McMillans was correctly characterized by the Ninth Circuit as pure "speculation."

CONCLUSION

The Respondent, Goleta Water District, respectfully requests that the Cross-Petition for Writ of Certiorari be denied.

Dated: February 3, 1987.

Respectfully submitted.

THOMAS P. ANDERLE
Attorney for Respondents

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 9, 1987, I served the within Brief for Respondents in Opposition in re: "A. Frank McMillan vs. Goleta Water District" in the United States Supreme Court, October Term 1986, No. 86-1150;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Timothy A. Bittle
Ronald A. Zumbrun
Robert K. Best
Counsel of Record
Pacific Legal Foundation
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Sacramento, California 95814
Attorneys for Respondents

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 9, 1987, at Los Angeles, California

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